**Include the Consideration of the Commercial Availability of Organic Ingredients in Evaluating the Formulation of Products To Be Labeled Organic**

**Comments of the Organic Trade Association on Docket Number TMD-00-02-FR**
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The Organic Trade Association thanks USDA for including the provision of commercial availability in this Final Rule establishing the National Organic Program. OTA welcomes this opportunity to comment and hopes that this comment describes how such a policy should be implemented to promote the organic industry's goals.

In this comment, OTA 1) proposes a change in the definition of commercial availability, 2) offers a refinement of the commercial availability policy submitted as part of OTA's comments on the Proposed Rule, and 3) answers the specific questions asked in the Final Rule.

This comment covers mostly concerns related to the commercial availability of ingredients for processed organic foods. Please note that OTA continues to support applying the concept of commercial availability to seeds, planting stock, and fruit stock. Due to the different considerations of farming and manufacturing, though, OTA encourages the establishment of different criteria and verification mechanisms for determining the commercial availability of seeds, planting stock, and fruit stock from the criteria and verification mechanisms for determining the commercial availability of manufacturing ingredients.

At this time, OTA supports the work of NOSB on this topic and hopes to work with NOSB over the next few months in creating commercial availability standards for seeds, planting stock and fruit stock.

## Proposed change in definition

OTA proposes that in the definition of commercial availability in the NOP final rule, the first "or' should be changed to "and", to read:

> The ability to obtain a production input in an appropriate form, quality, and quantity to fulfill an essential function in a system of organic production or handling, ...".

## Determination of Commercial Availability of Organic Ingredients

I Documentation of Lack of Commercial Availability

A The applicant must submit a written report to the certifying agent as part of the Organic Plan that lists:

1. Description and technical specifications of the input;
2. Known sources of the input, and organic status or lack thereof;
3. Written evidence of effort to locate sources of organic inputs, including letters and phone logs of discussions with potential suppliers. At least three suppliers must be contacted;
4. Estimate of the quantity of the inputs needed within a specified time, if this is a factor in the requested allowance of a non-organic input.
5. Explanation of how input is used to fulfill an essential function, and that there are no acceptable alternatives that may be sourced organically.

B. The certifying agent must:
1. Verify that the applicant has made a good faith effort to source organic inputs and evaluate the claim that no organic substitutes are available;
2. Keep a list of inputs that have been granted allowances in non-organic forms, and specify for what time periods;
3. Make these allowances known to the National Organic Program at the time of the certifier's initial accreditation and every annual review thereafter;
4. Update these lists on a regular basis as inputs become available in organic form;
5. Investigate availability when new information or complaints are received;
6. Require applicants to update this information in each annual Organic Plan; and
7. Products without sufficient documentation may not be labeled as "organic" but may be labeled as "made with organic (specified ingredients or food groups)."

C. During the accreditation process and annual reviews, AMS should review certification agencies' policies and procedures on commercial availability and all records of inputs determined by a certifying agent to be not commercially available.

## Comments On Questions

*1. What factors, such as quantity, quality, consistency of supply, and expense of different sources of an ingredient should be factored into the consideration of commercial availability?*

These factors are important in the determination of commercial availability. We are in basic agreement with the 1995 NOSB recommendation on commercial availability. That recommendation still represents the organic industry standard in the sense that it recognized commercial availability as a critical principle. OTA thinks it is noteworthy that hundreds of ingredients have become commercially available in organic form since OFPA's passage. These include, but are not limited to, numerous organic spices, seasonings, and other minor ingredients such as corn starch. Without the principle of commercial availability, OTA believes that many of these minor ingredients would never have been developed.

In essence, the 1995 NOSB recommendation stated that commercial availability should be determined by the certifying agent on a case-by-case basis. This determination process includes examining the good-faith efforts of the certified entity to secure the ingredient in question as well as an analysis of the cost of the ingredient and its impact on the final cost of the product. At this point, it is most noteworthy that rarely has price of an ingredient been a controlling factor in granting the commercially available allowance. However, even though extremely rare, we can

envision situations where this might be the case. If a quantifiable formula is absolutely necessary, we believe that where an organic ingredient costs ten times the cost of the same ingredient in its non-organic form, and where that ingredient's cost results in a twenty percent or more increase in the cost of goods, then an allowance based on price may be justifiable*[see footnote].

*2. What relative importance should each of these factors possess, and are there circumstances under which the relative importance can change?*

Rather than being a weighted decision, wherein each factor might be assigned a worth or fraction of importance, decisions of commercial availability are a succession of hurdles. Each hurdle must be cleared successfully in order to reach the goal of commercial availability. Commercial availability must mean that the input can be used without causing the price of the product to reach a point where consumers will not buy the finished good, so a certain "expense" goal must be met. Similarly, if "quantity" is insufficient to meet demand, customers will no longer be able to buy a product. If "quality" is not sufficient to meet the expected overall quality attributes expected for a brand or product, the consumer will not purchase a second time.

And, under the Final Rule, one may not use both organic and non-organic versions of an ingredient in a product when that ingredient is labeled as "organic", so if "consistency of supply" is not met, the product must either be re-labeled or cease to be produced when supply fails. A marketer of organic products cannot survive unless all variables in the decision are treated as "go/no go" decisions.

Quantity required is to be determined for individual product requirements, not to total corporate requirements for all potential product lines. Potential growers or suppliers must provide to the handler a written confirmation that the projected annual demand is available from existing stocks and/or predicted crop yield. Potential growers and suppliers must also be willing to contract for delivery of the annual quantity subject to force majeure.

Quality of an organic ingredient must be suitable to meet the handlers technical specifications and organoleptic quality requirements.

Regarding the price of an organic ingredient, please see our answer to the first question.

*3. What activities and documentation are sufficient to demonstrate that a handler has taken appropriate and adequate measures to ascertain whether an ingredient is commercially available?*

Under OTA's policy, written documentation of known sources of the ingredient (including organic status if known) and written contact logs of at least three suppliers were judged sufficient to prove the "quantity" and "consistency of supply" questions. If we approach the "quality" issue as meaning at least a one year's supply must be available, "consistency of supply" becomes a moot point. No one can predict crop failures or the future beyond a year. But the applicant has a responsibility to assure future sourcing. If "expense" or "quality" were problematic, a written explanation is required of why only non-organic materials suffice.

*4. How can AMS ensure the greatest possible degree of consistency in the application of the commercial availability standard among multiple certifying agents?*

Require certifiers to make these allowances known to the National Organic Program at the time of the certifier's initial accreditation and every annual review thereafter. During the accreditation process and annual review, AMS should review the records of certifying agents relating to their determination of commercial availability. To ensure consistency within the program, AMS should work to correct any inconsistencies in policies and procedures and their implementation.

*5. Could potentially adverse effects of a commercial availability standard, such as uncertainty over the cost and availability of essential ingredients, impact or impede the development of markets for organically processed products?*

A commercial availability standard predisposes a handler or formulator toward investigating the potential availability of organic minor ingredients. This also alerts raw material suppliers and brokers to the potential need for organic versions of minor ingredients. This exerts a positive force on the market place, encouraging suppliers of ingredients to develop a new organic raw material to offer to the prospective client.

*6. What economic and administrative burdens are imposed by the commercial availability standards found in existing organic certification programs?*

Existing programs that require documentation do not place significant economic or administrative burdens on handlers. Requiring that handlers develop a program to proactively create availability of a material judged not to be commercially available may require a handler to contract for growth of a specialty organic crop, and it's subsequent conversion into an organic input. This effort may require significant costs in terms of both money and manpower, given the minor percentage of the component.

*7. How would producers benefit from market incentives to increase use of organic ingredients that results from a commercial availability standard?*

Producers may not be aware that there is a market for a minor component. Since many organic producers are perhaps more modest in size than those who produce conventional "minor" ingredients, they can frequently justify growing a smaller organic crop (or producing a smaller volume ingredient, if a handler), if they know there is a likely market. The commercial availability clause encourages new organic crops to be planted, leading to greater diversity.

*8. Would lack of a commercial availability standard provide a disincentive for handlers of products labeled "organic" to seek out additional organic minor ingredients?*

Yes, without commercial availability standards, and with voluntary labeling of percent organic content, handlers would have little incentive to search out organic sources for anything over 95% of the formula. The organic community would like to see as many acres of organic land as possible, and would prefer a rule that pushes handlers to ever higher usage of organic ingredients.

*9. What impacts could this have on producers of minor ingredients?*

As producers of minor ingredients become aware of market demand for specific organic versions of minor ingredients, they will voluntarily seek to fill this demand by producing the organic version. As more producers of minor ingredients enter the market, all of the critical factors improve: price drops, supply becomes plentiful, quality improves, next year's availability is assured.

* OTA looks forward to working with NOSB and NOP during the next few months to fine-tune the aforementioned formula regarding price, if one is absolutely necessary. OTA reiterates that the concept of commercial availability needs to remain a part of this rule and that price has up to this point rarely been a factor in granting a commercial availability allowance. OTA prefers the approach embodied in the 1995 NOSB recommendation which requires certifying agents to make commercial availability allowances on a case-by-case basis. Given that commenters are being asked to provide a quantitative approach, OTA suggests referencing the two factors in the formula given above in reaching this case-by-case determination. Please refer to the comments submitted by Kahn, Harper, and Weakley and their minor ingredient sensitivity analysis.